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No. 97-902

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In the Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH R. STRAWBERRY, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the mandatory retirement provision of the Foreign Service Act of 1980, 22 U.S.C. 4052(a), applies to an employee of the Department of State who was transferred from the foreign service to the civil service and who elected to participate in the Foreign Service Retirement and Disability System and, subsequently, the Foreign Service Pension System.

2. Whether the court of appeals correctly held that the mandatory retirement provision of the Foreign Service Act of 1980, 22 U.S.C. 4052(a), does not violate the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 111 F.3d 943. The opinion of the district court (Pet. App. 7a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1997. A petition for rehearing was denied on August 26, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked for the Department of State in a foreign service position. In 1984, he was "converted" from the foreign service to the civil service

pursuant to 22 U.S.C. 4154(a), which requires such conversion when an employee of the Department of State is no longer "available for worldwide assignment." See 22 U.S.C. 4152(b), 4153(d). Pet. App. 2a, 7a.

Petitioner had the option of remaining in the Foreign Service Retirement and Disability System (FSRDS) or transferring to the Civil Service Retirement and Disability System. See 22 U.S.C. 4156(b). He elected to remain in the FSRDS, which had a more generous annuity formula and an earlier retirement option, but which required him to retire at age 65. See 22 U.S.C. 4052(a) (providing that an FSRDS participant "shall be retired from the Service at the end of the month in which the participant has reached age 65 and has at least 5 years of service credit toward retirement under the System"). Pet. App. 2a, 7a-8a.

After Congress adopted the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514, petitioner had the option of remaining in the FSRDS or transferring to the new Foreign Service Pension System (FSPS). See 22 U.S.C. 4071i. He elected to transfer to the FSPS, which provided a slightly smaller annuity than the FSRDS, but which also offered Social Security coverage and a thrift savings plan. See 22 U.S.C. 4071. He remained subject to the mandatory retirement provision of 22 U.S.C. 4052(a), which Congress made applicable to persons enrolled in the FSPS. See 22 U.S.C. 4071d(a) (providing that FSPS participants "shall be retired under the conditions specified in sections 4052 and 4053"). Pet. App. 2a, 8a.

Petitioner was required to retire on July 31, 1995, the last day of the month in which he reached age 65.

The Secretary of State denied petitioner's request for a waiver of mandatory retirement under 22 U.S.C. 4052(b)(2), which allows an employee to be retained if "the Secretary determines it to be in the public interest." Pet. App. 2a, 8a.

Petitioner filed suit in the United States District Court for the District of Columbia, contending that his mandatory retirement violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 2a.

2. The district court dismissed petitioner's suit on summary judgment. Pet. App. 7a-9a. Applying the "[l]ongstanding principle[] of statutory interpretation" that "a specific statute will not be controlled or nullified by a general one" absent a clear indication of a contrary legislative intent, the court held that the specific mandatory retirement provision in the Foreign Service Act of 1980, 22 U.S.C. 3901 *et seq.*, was not nullified by the ADEA's general prohibition against age discrimination. Pet. App. 9a (citing *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). The court noted that Congress had extended the ADEA to federal employees in 1974. But Congress had not at the same time invalidated the existing mandatory retirement ages applicable to certain federal employees, including FSRDS participants. And Congress had since enacted the Foreign Service Act of 1980, and the Federal Employees' Retirement System Act of 1986, both of which contained specific mandatory retirement provisions. Pet. App. 8a.

3. The court of appeals granted the government's motion for summary affirmance. Pet. App. 1a-6a. The court first rejected petitioner's argument that he was no longer subject to mandatory retirement under 22 U.S.C. 4052(a) once his position was converted

from the foreign service to the civil service in 1984. The court concluded that, because petitioner elected to continue to participate in the FSRDS, he "remained subject to the terms of the FSRDS, including the mandatory retirement provision." Pet. App. 5a. Nor did petitioner escape the mandatory retirement provision when he transferred from the FSRDS to the FSPS, given that 22 U.S.C. 4071d(a)(1) applies the mandatory retirement provision to FSPS participants. Pet. App. 5a.

The court of appeals then affirmed the district court's conclusion that "the ADEA's general prohibition of age discrimination does not prohibit enforcement of the mandatory retirement provisions" for participants in the FSRDS and the FSPS. Pet. App. 6a. The court noted that Congress had twice addressed the mandatory retirement requirement applicable to petitioner since extending the ADEA to federal employees in 1974—by raising the mandatory retirement age for FSRDS participants in 1980 and by applying the mandatory retirement provision to FSPS participants in 1986. The court could thus discern no congressional intent that the ADEA nullify the specific mandatory retirement requirements for FSRDS and FSPS participants. *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner, like other participants in the Foreign Service Retirement and Disability System (FSRDS) and the Foreign Service Pension System (FSPS), was required under 22 U.S.C. 4052(a) to retire at age 65. Congress applied that mandatory retirement provision to all FSRDS and FSPS participants, including those who, like petitioner, were transferred from the foreign

service to the civil service due to their unavailability for worldwide assignment. And Congress nowhere indicated that the general provisions of the Age Discrimination in Employment Act (ADEA) were intended to modify or nullify the specific mandatory retirement provision applicable to petitioner and other FSRDS and FSPS participants. The court of appeals' decision does not conflict with any decision of this Court or any other circuit. It therefore merits no further review.

1. Petitioner contends (Pet. 7) that Section 4052(a) "was not intended by Congress to apply to individuals in the civil service." As the text of the relevant statutes makes clear, however, Section 4052(a) applies to all FSRDS and FSPS participants, whether they are in the foreign service or the civil service when they reach age 65.

Section 4052(a) provides that "any participant" in the FSRDS "shall be retired from the Service at the end of the month in which the participant has reached age 65 and has at least 5 years of service credit toward retirement under the [FSRDS]." No exception is made for FSRDS participants, such as petitioner, who were converted from the foreign service to the civil service under 22 U.S.C. 4154 because they were unavailable for worldwide assignment. The statute's reference to "retire[ment] from the Service" does not mean that only those FSRDS participants who are not transferred out of the foreign service are subject to mandatory retirement. As the court of appeals explained, "§ 4052(a) naturally refers only to retirement from the Foreign Service, since it is part of the Foreign Service Retirement and Disability System." Pet. App. 4a-5a; see also 22 U.S.C. 4051 (similar reference to "the Service" in voluntary retirement provi-

sion). There is, however, no basis for assuming that Congress intended to exempt petitioner and other FSRDS participants who were converted out of the foreign service "from the burdens imposed on other FSRDS participants while affording them the same benefits" (Pet. App. 5a)—which were more generous than the benefits that they would have received had they elected under 22 U.S.C. 4156(b)(1) to transfer to the Civil Service Retirement and Disability System (Pet. App. 2a). In short, Congress did not evince any intent to allow petitioner, and others similarly situated, to have their cake and eat it too.

Petitioner likewise remained subject to the mandatory retirement provision of Section 4052(a) after he transferred from the FSRDS to the FSPS. Congress expressly provided that "[a]ny participant" in the FSPS "shall be retired under the conditions specified in section[] 4052." 22 U.S.C. 4071d(a)(1). Petitioner nonetheless contends (Pet. 6) that the Court should ignore the plain language of that provision, because Congress intended that FSPS participants generally "be treated in the same manner as persons in the Federal Employees' Retirement System." But Congress actually provided that FSPS participants are to be treated similarly to Federal Employees' Retirement System participants "[e]xcept as otherwise specifically provided in this part [*i.e.*, the FSPS provisions of Title 22] or any other provision of law." 22 U.S.C. 4071(b). One such exception is 22 U.S.C. 4071d(a)(1), which subjects FSPS participants to mandatory retirement.

Petitioner asserts (Pet. 4), without explanation, that the court of appeals' decision "is contrary to" this Court's decision in *Vance* v. *Bradley*, 440 U.S. 93 (1979). In *Vance*, however, the Court rejected an

equal protection challenge to the statutory predecessor to Section 4052(a), which required FSRDS participants to retire at age 60, whereas participants in the Civil Service Retirement and Disability System were not subject to mandatory retirement. See 440 U.S. at 95-96, 109. *Vance* is thus entirely consistent with the decision below.

2. Petitioner also contends (Pet. 7) that subjecting FSRDS and FSPS participants to mandatory retirement under Section 4052(a) violates the ADEA. The court of appeals correctly concluded that the ADEA's general provision that federal employees "shall be made free from any discrimination based on age," 29 U.S.C. 633a(a), does not override the specific statutory provisions establishing a mandatory retirement age for FSRDS and FSPS participants. It is well-settled that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); accord *Edmond* v. *United States*, 117 S. Ct. 1573, 1578 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

Congress expressed no such "clear intention otherwise" with respect to the statutes at issue here. In 1974, when Congress amended the ADEA to cover federal employees, Congress did not invalidate the existing mandatory retirement provisions applicable to certain federal employees, including FSRDS participants. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 74-75 (codified at 29 U.S.C. 633a); see also *Johnson* v. *Baltimore*, 472 U.S. 353, 357 (1985) (noting that 1978 amendments to ADEA "left untouched several mandatory retirement provisions of the federal civil service statute

applicable to specific federal occupations, * * * as well as mandatory retirement provisions applicable to the Foreign Service and the Central Intelligence Agency"). And Congress has since affirmatively authorized mandatory retirement for certain federal employees. In 1980, for example, Congress reenacted the mandatory retirement provision applicable to FSRDS participants, while raising the retirement age from 60 to 65. Foreign Service Act of 1980, Pub. L. No. 96-465, Tit. I, § 812, 94 Stat. 2113. (codified at 22 U.S.C. 4052(a)). In 1986, Congress extended that provision to participants in the newly created FSPS. Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, Tit. IV, § 415, 100 Stat. 617 (codified at 22 U.S.C. 4071d(a)(1)). Accordingly, as the court of appeals concluded, Section 4052(a) "do[es] not run afoul of the ADEA." Pet. App. 6a.

Finally, petitioner suggests (Pet. 5, 6) that the mandatory retirement requirement for FSRDS and FSPS participants violates the ADEA for the same reasons as did the mandatory retirement requirements in *Western Airlines* v. *Criswell*, 472 U.S. 400 (1985), and *Johnson* v. *Baltimore*, *supra*. But those decisions are inapposite. Both involved the application of the ADEA's exception for bona fide occupational qualifications, see 29 U.S.C. 623(f)(1), as applied to commercial airline flight engineers in *Western Airlines* and to city firefighters in *Johnson*. That exception to the ADEA is not at issue in this case. Neither *Western Airlines* nor *Johnson* involved a claim that the ADEA exempted a category of federal employees from a specific mandatory retirement provision enacted by Congress. Indeed, the Court in *Johnson* recognized, consistent with the decision here, that federal law-enforcement officers and federal firefight-

ers remained subject under 5 U.S.C. 8335(b) to mandatory retirement at age 55 "despite the provisions of the ADEA." 472 U.S. at 357. Accordingly, nothing in either case casts any doubt on the correctness of the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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